IN THE

Supreme Court of the United States

October Term, 1957

No. 686

HARRY PAISNER and SAMUEL PAISNER, Co-partners, d/b/a QUALITY MANUFACTURING COMPANY,

Petitioners,

v.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

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Petitioners,

v.

THE UNITED STATES,
Respondent.

Petition for Writ of Certiorari to the Court of Claims of the United States

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Claims entered on May 8th, 1957, rehearing denied October 9th, 1957.

Opinions Below

The majority and dissenting opinions in the Court of Claims (not yet officially reported) are set forth in the appendix, pages 15, *et seq.* The Court's findings and Conclusions of Law are set forth in the appendix, pages 24, *et seq.*

Jurisdiction

The judgment of the Court of Claims was entered on May 8th, 1957. A motion for rehearing was denied on October 9th, 1957, by order, without opinion. Jurisdiction of this Court is invoked under 24 U. S. C., Sec. 1255(1).

Questions Presented

This case presents an important question of construction of the Walsh-Healey Public Contracts Act (49 Stat. 2036, *et seq.*, 41 U. S. C. 35, *et seq.*) as that act affects the validity of contracts awarded to persons while they are on a list of ineligibles. Specifically, the questions presented are as follows:

1. Does the sanction of ineligibility prescribed by Sec. 3 of the Walsh-Healey Act (41 U. S. C. 37) commence upon the making of findings of violation of the act by the Secretary of Labor's trial examiner or upon the later occasion of the Secretary of Labor's confirmatory findings upon application for review by him?

2. Is a contract awarded to one ineligible under the Walsh-Healey Act, illegal and void?

3. If so, does the lifting of ineligibility remove the illegality of the contract so as to permit recovery for performance thereunder?

4. If not, is the illegality such as to prevent recovery in *quantum meruit* for performance?

5. May the government recover any part of the monies paid for completed performance?

6. Where no facts, or insufficient facts, are found to establish a defense of fraud, may the government recover for expenses of removal of its materials which it had placed in the possession of the contractor for work thereon under the contract?

7. If common law fraud is established, may the government rescind the contract on a ground other than that of fraud, and be entitled to recover for that fraud?

8. If fraud is established, may the government avoid payment for satisfactorily completed performance and recover for profits earned on previous contracts made under similar circumstances?

9. Is the mere taking of a contract by an ineligible contractor a violation of the Walsh-Healey Act? Is it a fraudulent act?

10. Under all of the facts found, what recovery, if any, should have been allowed the parties on their respective claims and counterclaims?

Statute Involved

The Walsh-Healey Public Contracts Act (49 Stat. 2036, *et seq.*, 41 U. S. C. 35, *et seq.*) is the statute involved. The specific portion affecting this case is Sec. 3 of the Walsh-Healey Act (41 U. S. 37), which provides as follows:

> "The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by sections 35-45 of this title. Unless the Secre-

tary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred."

Statement

The individual plaintiffs, doing business as Westchester Hats, performed contracts for the government during World War II. They violated the Walsh-Healey Act. A hearing was held before a trial examiner of the Secretary of Labor who made a determination on June 24th, 1948 of such violation and recommended no lifting of the ineligibility (This date was not specifically entered or mentioned in the findings below). This report was adopted by the Wage and Hour Administrator on August 4th, 1949. Upon petition for review, the Secretary of Labor, on April 24th, 1950, confirmed the findings and refused to lift the ineligibility penalty. On May 16th, 1950, the Comptroller General notified all agencies of the United States that Harry Paisner and Samuel Paisner, doing business as Westchester Hats, should not be awarded contracts for a period of three years beginning April 24th, 1950.

In 1946, the Paisners had changed their business name to Quality Manufacturing Co., retaining however, their partnership status. Their individual names and the name Westchester Hats were placed on a list of ineligibles in the Department of the Army on May 26th, 1950, as of April 24th, 1950.

Pursuant to an invitation for bids issued by the government on October 16th, 1951, and a bid submitted by the plaintiffs, they were awarded a contract by the army on

December 14th, 1951, for the manufacture of 50,000 sleeping bags from government furnished material at a price of $.989 per unit for a total contract price of $49,450. The invitation to bid was made subject to stipulations required by the Walsh-Healey Act and regulations of the Secretary of Labor. The Court of Claims found that incorporated in the contract by reference was a representation of eligibility, but expressly, also, found as follows (Finding 5, App. p. 27):

> "It is reasonable to conclude that the erroneous determination by the contracting officer that the plaintiffs were not on the debarred list, which led to the award of the contract, was made in reliance on the list of debarred contractors rather than upon plaintiffs' subscription to the contents of the Secretary of Labor's regulations quoted above, which were incorporated in the contract by reference."

On March 8th, 1952, while engaged in performance of the contract, the plaintiffs received a telegram from the contracting officer directing them to discontinue performance. This was supplemented by a letter dated April 10th, 1952, cancelling the contract as void *ab initio* because of debarment under the Walsh-Healey Act. Neither fraud nor any other ground was mentioned as a ground for cancellation. 12,106 completed units were thereupon shipped and accepted. The balance of the contract, involving 37,894 units, was not performed. The profit per unit was found to be $.119.

On May 8th, 1952, the Secretary of Labor requested the Comptroller General to remove the plaintiffs' names from the list of debarred contractors, thus restoring their eligibility.

The petition in the Court of Claims requests payment for the finished and delivered articles in the sum of

$11,972.83 and damages for breach in the sum of $4,509.41 for the unperformed portion of the contract and alternatively, recovery in *quantum meruit* for the value of performance, to wit, the sum of $11,972.83.

The answer as amended, pleads illegality of the contract because of ineligibility under the Walsh-Healey Act, counterclaims for the return of $181,580.46 paid to the plaintiffs for performance of two previous contracts, pleads fraud by false representations of eligibility and demands return of expenses in the amount of $1,171.87 for shipment of government owned goods under the last contract on the basis of the alleged fraud.

The Court permitted the plaintiffs a recovery of $10,532.21 for the delivered performance (price, $11,972.83, less profit of $1,440.62). It allowed the defendant a recovery of $21,789.66, the profit made by the plaintiffs on the two earlier contracts, plus the sum of $896 spent in removing the unworked cloth. This resulted in a net recovery to the defendant of $12,153.45.

The decision was divided. The majority opinion, written by Madden, J., was concurred in by Laramore, J., Littleton, J., and Jones, C.J. A dissenting opinion by Whitaker, J., held that the plaintiff should not be permitted any recovery, the defendant should not be permitted recovery of moneys paid heretofore, but should be permitted to recover the $896 item.

Reasons for Granting the Writ

The court did not make any express finding of illegality or of fraud. It based its decision upon a consideration of the question, as it saw it, of conserving the purpose and policy of an important public statute without inflicting upon the violator of the statute disproportionate and un

duly harsh economic punishment. The court readily conceded that the provisions of the Walsh-Healey Act are relatively mild except for a ten dollar a day penalty provision which provision it found to be merely compensatory and not punitive. It also found that the provision about cancelling the contract and charging the violator with the excess costs of substitute performance seems to negative any idea that the contractor is to forfeit the right to be paid for what performance he has accomplished before cancellation or that he is to be required to pay back what he has received for completed performance. It then states "We think that Congress, dealing so mildly with violators of the act at the time of the violation, cannot be regarded as having intended to deal infinitely more harshly with former violators who have already paid the penalties expressly provided by the statute, and have committed no new violations".

The court thus expressed a feeling that the attitude of Congress was one of leniency towards violators. It made no finding and no statement to the effect that it considered the contracts taken while ineligible to be invalid. However, it went on to state that the plaintiffs' bidding for and acceptance of the contracts on which their suit is based and the earlier contracts on which the government's counterclaim is based, was "deceptive and reprehensible". With this "legal" basis for decision it then went on to find as indicated above.

Judge Wittaker in his dissenting opinion held that the plaintiffs perpetrated a fraud in taking the contract although he does not state how the facts as found indicated this fraud. He says no statute provides for recovery by the government of a contractor's profit as a penalty therefor. He then stated that there could not be any recovery by the plaintiffs but that there could also be no recovery

by the defendants except for the cost of removal of the unworked on goods.

This case seems to be one of first impression. There appear to be no decisions by any court as to the effect of the taking a contract while ineligible, either under the Walsh-Healey Act, or any of the other acts declaring a contractor ineligible. Concomitant questions to be determined are whether illegality of the contract, if found, prevents recovery. There is also to be considered the question of whether fraud has been properly found on the facts as found in this case and if so what the effect of that finding may be. Finally, the court may indicate what recovery is proper under its findings as to the applicable law.

POINT I

Congress did not intend ineligibility to void the contracts.

The contracts are legal and valid. It was not the intention of Congress to condemn the contracts as illegal. Congress could and would have used express language to indicate illegality, had it so intended, as it did in other enactments. Instead, it expressed a mild and lenient attitude as found by the Court of Claims itself. Congress did not even declare violators ineligible as an absolute matter. The choice lay within the discretion of the Secretary of Labor, who also was given further discretion to remove ineligibility which he had permitted to apply. And the Secretary of Labor did just that in this case, while the plaintiffs were still performing the last contract. To find the contracts illegal seems inconsistent with the intention of Congress as expressed in the legislation. There is thus presented for determination by this court a clear question as to whether the contracts are invalid.

POINT II

If ineligibility affected the contracts, only one contract was so affected.

The findings of the Trial Examiner made June 24th, 1948, were the findings of the Secretary of Labor. The Wage and Hour Administrator merely adopted those findings and the Secretary of Labor confirmed on review. Ineligibility commenced, therefore, on June 24th, 1948 and terminated on June 23rd, 1951 (The second and third contracts were taken after that latter date). Thus only the first contract is affected. Otherwise, the anomalous and embarrassing situation would obtain where those found guilty of violations could continue to take valid contracts. The question of when ineligibility first applied should be determined by this court as a guide to future conduct, and possibly as a basis of modification of the judgment herein.

POINT III

Assuming the contract to be invalid, recovery should have been allowed in *quantum meruit*.

The court below applied incorrect rules of law in arriving at its judgment.

It appears that the court below has failed to make any finding of invalidity or illegality whatsoever. At most it intimated that there was some fraud involved. Assuming that it decision can be interpreted as one of finding of invalidity, that invalidity is based upon such cases as *Sutton* v. *United States*, 256 U. S. 575; *The United States* v. *Trinidad Coal & Coke Company*, 137 U. S. 160;

and *Causey* v. *United States*, 248 U. S. 399. A consideration of the facts in those cases and the rationale for the holdings therein present ready distinctions between those cases and the instant case. In the *Sutton* case Congress had definitely and specifically prohibited any contracts whatsoever with anybody at all for which no appropriations had been passed. Thereunder, government officials were prohibited from making contracts with anybody for work or the supplying of materials which the government did not desire or require. The obvious purpose was to prevent government officials from imposing upon the government that which it did not seek. Such contracts were susceptible of great mischief, harm and detriment to the government, and all authority to contract was therefore eliminated. Nobody had any right, power or authority to let out any contract at all and to have given that contract enforceability would have imposed obligations on the part of the government to pay practically without limitation and at the behest of officials without power, and who acted as their whims dictated. Such a course would no doubt be ruinous to government operations and there was no alternative but for the Court to find such a contract absolutely void and not permit recovery thereunder. In the instant case, there was authority and power to make the contract. In fact there was a duty to do so. Money had been appropriated for the purpose. It had become a matter of choice as to persons with whom to make the contract. No fraud was practiced upon the government either in obtaining the contracts or in the rendition of performance. The government was in no way whatsoever injured by performance and the integrity of the government was not affected.

Similar arguments can be made concerning *United States* v. *Trinidad Coal & Coke* and *Causey* v. *United States*. In the *Trinidad* case patents for coal lands were obtained by

means of a fraudulent scheme, device and a conspiracy to evade the land laws. The government sued to regain its lands and that case was decided upon the same principles as the *Causey* case.

There are numerous other cases following the same principles wherein recovery was not allowed. As pointed out, however, there is a definite distinction between those cases and the case at bar. However, assuming the taking of the contracts in this case to have rendered them tainted with illegality, that illegality was such as not to prevent the recovery at least in *quantum meruit* in accordance with the decisions which allowed recovery in such cases, of which decisions there are a great number. For example, *Clark* v. *United States*, 95 U. S. 539; *L. Shepps Coal* v. *United States*, 61 C. Cl. 219; *Arthur* v. *United States*, 16 C. Cl. 422; *Reid Wrecking* v. *United States*, 55 C. Cl. 453; *Horton* v. *United States*, 57 C. Cl. 395; *Savage* v. *United States*, 92 U. S. 382 and *St. Louis Hay and Grain* v. *United States*, 191 U. S. 159.

As a matter of fact the Court of Claims has not been consistent in its decision in this case with its decisions in other cases. An example of that has come to the attention of the plaintiffs recently. In the case of *New York Mail and Newspaper Transportation Company* v. *The United States*, in which case a petition for writ of certiorari to the Court of Claims was filed for the October term, No. 573, it appears that although the Court of Claims found the contract therein to have been illegal and therefore void, because same was obtained without prior public bidding, the court did permit a recovery for all costs and expenses to the plaintiffs and permitted no recovery to the defendant. In the instant case, the court did permit a recovery to the defendant.

The cases to be discussed are entirely too numerous to be included in the short statements required for the purposes of *this petition*.

Those cases and their rationale involve such questions as *malum in se* and *malum prohibitum*, the intentions of the enacting bodies, the public policies to be served, the potential for public harm, which will be fully analyzed and discussed should this petition be granted. It should then abundantly appear that the plaintiffs herein did not receive the benefits of the law as it applies or should apply to them. The decision below is inconsistent and confusing.

POINT IV

The Court of Claims erred in permitting any recovery by the defendant.

The Court below disagreed on the question of allowance for recovery of profits. The dissenting opinion indicated that no basis exists for such allowance, as indeed, it does not. The majority opinion cited no authority for permitting such recovery. However, there is definite authority for not permitting such recovery (*Clark* v. *United States*, 95 U. S. 539, 542; *Horton* v. *United States*, 57 C. Cl. 395; *Arthur* v. *United States*, 16 C. Cl. 422; *Reeside* v. *United States*, 2 C. Cl. 1). Furthermore, the Court itself stated that it did not seem that the statute required paying back what had been received for performance. The allowance of recovery was obviously contrary to this express pronouncement, and should be reviewed.

POINT V

The Court of Claims erred in basing any part of its decision and award on fraud.

In its opinion, the Court stated, "The plaintiffs' bidding for and acceptance of the contracts on which their suit is based, and the earlier contracts on which the second count of the Government's counterclaim is based, was deceptive and reprehensible" (Appendix, p. 20). The defense of fraud was based on misrepresentation or common law fraud. There was no finding of such fraud, or any fraud. The express findings of fact (Findings 4, 5, Appendix, pp. 25, 26, 27), indicate no reliance on any representations by the plaintiffs, but only reliance on the government's own list, where the names of the individual plaintiffs did appear. Therefore, no finding of common law fraud could be made as a matter of law. Nor could the taking of the contracts be deemed fraudulent in any sense because no scheme, trick or subterfuge was employed. The change of name from Westchester Hats to Quality Manufacturing was made in 1946, years before the contracts could even be contemplated. The change was required by a different kind of business operation. The plaintiffs did not hide behind a corporate form, hide their identities or use undisclosed agents. They revealed themselves openly and frankly. There was no deception of any kind. Therefore, any talk of fraud is entirely gratuitous here.

Nor can the mere taking of the contract be deemed a fraudulent act, since no facts are in the record indicating that the plaintiffs were aware or had reason to be aware that the government was in some way misled or mistaken concerning whom the contracts were awarded to or that an error had been made.

If the decision is based on fraud, rather than illegality, as the language of the court would make it appear, since no damages from past performance were alleged or proved, there could be no recovery thereof by the defendant. At most, the government could rescind the uncompleted contract, pay for the part performed and refuse to allow further performance. It could not properly have been allowed to recover the expense of cloth removal because that expense did not result from the alleged fraud, but from the unnecessary cancellation.

However, if fraud does appear, it was not the basis for cancellation and was, therefore, waived. The contracts were cancelled for invalidity *ab initio*, because of ineligibility. Nothing else appears anywhere as to the ground of avoidance of the contracts prior to suit.

Thus, no basis whatsoever for any element of fraud properly appears in the case.

CONCLUSION

It is respectfully submitted that for all the foregoing reasons, this petition should be granted.

December 17th, 1957.

Respectfully submitted,

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APPENDIX

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

During World War II the plaintiffs, then trading as a partnership under the name of Westchester Hats, committed certain violations of the Walsh-Healey Public Contracts Act (49 Stat. 2036, *et seq.*, 41 U. S. C. 35, *et seq.*) in the performance of their Government contracts. Eventually, after investigation, hearings, and a report and recommendations by the trial examiner of the Department of Labor, the Secretary of Labor, on April 24, 1950, made findings and a decision that plaintiffs were guilty of the violations as charged.

Section 3 of the Walsh-Healey Act (41 U. S. C. 37), after directing the Comptroller General to distribute a list to all Government agencies of all persons or firms found by the Secretary of Labor to have violated the Act, provides as follows:

> * * * Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

The Secretary of Labor made no recommendation of leniency as to the plaintiffs and so for a period of three years from April 24, 1950, they were ineligible to receive Government contracts.

In the meantime the plaintiffs in 1946 changed their partnership name to Quality Manufacturing Company. In 1950 and again in 1951 plaintiffs, trading as Quality Manufacturing Company, obtained two contracts from the defendant for the manufacture of field caps while they were still on the list of debarred bidders. These contracts were fully performed and plaintiffs were paid the contract price of $181,580.46.

In December 1951 a third contract calling for the manufacture of 50,000 sleeping bags was awarded to Quality Manufacturing Company on a bid form which was signed by Harry Paisner, partner, and clearly indicated Quality to be a partnership. The plaintiffs commenced performance under this contract. On March 18, 1952, the Government issued a stop order, later confirmed by its letter to plaintiffs of April 10, 1952, which canceled the contract as void *ab initio* because it had been discovered that the plaintiffs were debarred from receiving Government contracts.

Before awarding this last contract to plaintiffs, the defendant's contracting officer had made a routine examination of the list of debarred contractors which his office maintained in current condition, but had through error failed to find plaintiffs' names there. The apparent reason for this error was that, while the list in question carried the names of Harry Paisner, Samuel Paisner, and Westchester Hats (the names under which the Department of Labor had prosecuted plaintiffs and which had been circularized by the Comptroller General to the procurement agencies), it did not include the name of the Quality Manufacturing Company.

By the time plaintiffs received the stop order of March 18, 1952, they had already cut material sufficient for 11,000 sleeping bags and, after inquiry, were instructed by the Government inspector to suspend further cutting but to

finish the assembly of the parts already cut. Plaintiffs actually delivered a total of 12,106 sleeping bags, which the Government accepted. Thus, they cut material for 1,106 units after receiving clear instructions to discontinue cutting. On May 8, 1952, prior to the last shipment of 3,106 completed units on May 16, the Secretary of Labor removed plaintiffs from the debarred list, so that from May 8 on they resumed their capacity as eligible contractors.

The Government refused to pay plaintiffs for the delivered and accepted sleeping bags, and plaintiffs are suing to recover not only the contract price of the completed and accepted units, but also the loss of profits on the balance of the contract which the defendant's stop order prevented them from completing.

Subsequently the defendant relet the balance of the contract to another contractor, and incurred a cost of $896 in removing from plaintiffs' plant the remaining Government-furnished material which had not been cut. In its first counterclaim the defendant asks a judgment in that amount. In its second counterclaim the defendant asks for a judgment of $181,580.46, the amount paid plaintiffs for full performance of the two earlier contracts referred to above.

The adjudication of the plaintiffs' claims and the Government's counterclaims presents the delicate question of conserving the purpose and policy of an important public statute without inflicting upon the violator of the statute disproportionate and unduly harsh economic punishment.

Congress, in section 3 of the Walsh-Healey Act, the pertinent part of which is quoted, *supra*, herein, did not state what should be the consequences, if contracts were in fact awarded to and performed by persons to whom, the statute says, "no contracts shall be awarded." It was, no doubt, supposed that the provisions would be self-enforcing, since

the Government's contracting agents could readily be furnished the names of the relatively small numbers of adjudged violators. In these circumstances, we can only surmise how severely Congress would have desired that such persons should be treated.

Section 2 of the Walsh-Healey Act (41 U. S. C. 36), provides for the penalties which a direct violator of the act shall suffer. He is penalized $10 per day per person for knowingly working persons who are under age, or for working convict labor, and is required to pay to the Government, for the benefit of the workmen, the amount of any improper deductions, rebates, or refunds, and of any underpayment of wages. The Government is given the right to cancel the contract and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor.

These relatively mild provisions, all of them except the $10 per day provision being merely compensatory and not punitive, are what Congress imposed upon the substantive violator of the Walsh-Healey Act. The provision about canceling the contract and charging the violator with the excess costs of substitute performance seems to negative any idea that the contractor is to forfeit the right to be paid for what performance he has accomplished before cancellation, or is to be required to pay back what he has received for completed performance.

We think that Congress, dealing so mildly with violators of the act at the time of the violation, cannot be regarded as having intended to deal infinitely more harshly with former violators who have already paid the penalties expressly provided by the statute, and have committed no new violations.

The former violator can be made eligible for new contracts by the simple direction of the Secretary of Labor that his name should be taken off the ineligible list. Congress has prescribed no conditions for this action of the Secretary, leaving it solely in his discretion. In the instant case, on February 5, 1952, while the plaintiffs were in the midst of performing the sleeping-bag contract, for which they were, of course, ineligible, the plaintiffs petitioned the Secretary to remove them from the ineligible list. In their petition they stated that they were "scrupulously and with strict attention to the minutest detail" observing the labor standards prescribed by the Walsh-Healey Act and all Federal, State, and municipal laws. The Secretary might well have wondered how they were complying with the Walsh-Healey Act when they were, and for almost two years had been ineligible to receive Government contracts. In April, their sleeping-bag contract was canceled by the contracting officer because of their ineligibility. However, the Government's inspector told the plaintiffs to finish assembling the work which was already cut, and the plaintiffs did this. On May 8, the Secretary removed their names from the ineligible list. Not until May 16 did the plaintiffs ship and the Government accept, the last of the sleeping bags, which the plaintiffs manufactured under the contract.

We suppose that the Secretary, having apparently uncontrolled discretion as to putting contractors on and taking them off the ineligible list, would have the power to take them off the list *nunc pro tunc*. It may be that the Secretary intended to do that in this case. On the other hand it may be that in spite of the almost express notice in the plaintiffs' petition to the Secretary that they were engaged in the performance of a Government contract, he may have been unaware of it and may have had no intention to make his action retroactive.

The plaintiffs' bidding for and acceptance of the contracts on which their suit is based, and the earlier contracts on which the second count of the Government's counterclaim is based, was deceptive and reprehensible. It was also reckless and foolhardy. They, by making these contracts and spending their money in performing them, exposed themselves to almost unlimited financial risks. The extent of those risks is evidenced by the fact that Commissioner Bernhardt of this court, after a careful and thoughtful consideration of the the facts and the legal precedents, felt compelled to the conclusion that they had forfeited all right to be paid for 9,000 of the sleeping bags which they manufactured, though the reasonable value of their work was $8,901, and in addition had forfeited all right to retain $181,580.46, which had been paid them as the contract price and, apparently, the reasonable value, of the work which they had done on former contracts.

The cases in which courts have considered problems comparable to our problem are legion. The decisions are not all consistent with each other. With variations in emphasis in one direction or the other, the decisions demonstrate, as one would expect, an effort on the part of the courts to uphold the purpose and policy of the applicable law, and at the same time refrain from unnecessarily vindictive treatment of the violator. If there is a way of achieving both of those desirable ends in this case, we should follow that way. We should not, in effect, fine the plaintiffs $190,000 for conduct for which we are by no means certain that Congress meant that they should be penalized at all.

The purpose of the plaintiffs in bidding for and accepting the contracts for which they were ineligible was, of course, to make a profit. If the hope of making, or of retaining a profit from such conduct is removed, the policy of the Walsh-Healey Act is conserved, and no person in

his right mind, no matter how unscrupulous he may be, will take a contract under those conditions. Applying that doctrine in this case, the plaintiffs are entitled to recover $10,532.21, which represents the contract price of $11,972.83 for the 12,106 sleeping bags which they completed and delivered, less $1,440.62, which was their profit on the units delivered. The Government is entitled to recover on the first count of its counterclaim the $896 which it spent in delivering to and removing from the plaintiffs' plant those materials which the plaintiffs were not permitted to manufacture. On the second count of its counterclaim the Government is entitled to recover $21,789.66, which was the plaintiffs' profit on the two contracts for which it was paid $181,580.46.

The defendant is entitled to a judgment against the plaintiffs for $12,153.45.

It is so ordered.

LARAMORE, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.

WHITAKER, *Judge*, dissenting:

The Walsh-Healey Act provides no penalty against an ineligible contractor who enters into a contract with defendant. It is true plaintiffs failed to reveal, even concealed, their identity as ineligible contractors, and contracted with full knowledge of their ineligibility. In so doing, they perpetrated a fraud against the United States, in that they, by deceit and trickery, circumvented the purpose of the Act. But, no statute provides for recovery by the Government of a contractor's profit as a penalty therefor. How can we allow recovery where there is no statutory or contractual authority therefor?

Under the common law, fraud vitiated the contract and allowed, in the absence of any equitable considerations at least, recovery of actual damages sustained as a result of the fraud; but it is not shown that the defendant suffered any monetary damage, except $896, the cost of furnishing plaintiffs with material and removing it from plaintiffs' premises after termination.

The common law did not permit recovery of money paid on a contract induced by fraud, unless actual monetary damage was sustained as a result of the fraud. On the other hand, to annul a transaction fraudulently induced, the party seeking relief therefrom was obliged to return the consideration received thereunder. See *Causey* v. *United States*, 240 U. S. 399, and many other cases.

So much for the two contracts fully performed, and paid for.

However, I think that under the forfeiture statute (28 U. S. C. 2514), plaintiffs' claim for the amount unpaid on the terminated contract may be forfeited, because plaintiffs' claim is tainted with the fraud they perpetrated in securing the contract. Except for the fraud there would have been no contract and no claim.

It is not necessary that the Government should have suffered monetary damage. The criminal statutes provide (18 U. S. C. 88) that where there has been a conspiracy to violate an Act of Congress, the conspirators may not escape liability because the United States has not suffered any pecuniary loss. The fact that the lawful function of the Government has been impaired or defeated, or that the United States has been defrauded in any manner, whether pecuniary loss has been suffered or not, is sufficient for conviction. *Hude* v. *Shine*, 199 U. S. 62; *Dimond* v. *Shine*, 199 U. S. 88; *Haas* v. *Henkel*, 216 U. S. 462; *Glasser* v. *United States*, 315 U. S. 60.

Plaintiffs, Harry Paisner and Samael Paisner, were undoubtedly guilty of a conspiracy to defraud the Government, using the word "fraud" in this sense, when, by concealing their identity they induced the Government to award them this contract, in violation of the Walsh-Healey Act. Hence, I think it is our duty to declare forfeited the amount due them under the terminated contract.

The Commissioner in his opinion has cited a number of cases where the plaintiffs have been denied recovery where the contract has been entered into illegally or the indebtedness has been incurred illegally. They are: *United States* v. *Trinidad Coal & Coking Co.*, 137 U. S. 160; *Causey* v. *United States*, *supra*; *Sutton* v. *United States*, 256 U. S. 575; *Pan American Petroleum & Transport Co.* v. *United States*, 273 U. S. 456; *Atlantic Contracting Co.* v. *United States*, 57 C. Cls. 185; *Rankin* v. *United States*, 98 C. Cls. 357.

I do not think the plaintiffs can recover the amount unpaid on the terminated contract, notwithstanding the fact that a Government agent ordered plaintiffs to complete the sleeping bags the materials for which had already been cut. The facts were similar in *Sutton* v. *United States*, *supra*, where the recovery was denied; but I do not think the Government may recover amounts already paid on a contract fully performed. 28 U. S. C. 2514 does not authorize affirmative action by the United States to recover amounts already paid under a contract entered into in violation of the law.

I would deny plaintiffs' recovery and allow defendant to recover $896, the cost of furnishing and removing material from plaintiffs' premises.

FINDINGS OF FACT

The court, having considered the evidence, the report of Commissioner C. Murray Bernhardt, and the briefs and argument of counsel makes the following findings of fact:

1. Prior to 1946, plaintiffs were copartners doing business under the firm name of Westchester Hats. In that year plaintiffs changed the partnership name to Quality Manufacturing Company and have been doing business since the under the latter name.

2. On April 24, 1950, the Secretary of Labor made a finding and decision under section 5 of the Walsh-Healey Public Contracts Act (49 Stat. 2038, 41 U. S. C. 39, as amended), that Harry Paisner and Samuel Paisner, copartners doing business as Westchester Hats, in the performance of certain specified supply contracts for the Government during the period from April 23, 1942, to June 19, 1945, had breached the contracts and violated the Act by failing to pay minimum straight-time hourly wages and overtime compensation as therein required, and by failing to keep proper employment records. The Secretary's determinations were made after a hearing before a trial examiner on a complaint duly issued, and a report and recommendations by the hearing examiner adopted in relevant detail by the Administrator of the Wage and Hour and Public Contracts Divisions. The finding and decision of the Secretary of Labor were communicated to plaintiffs and are not challenged by them in this action.

3. A copy of the decision of the Secretary of Labor was sent to plaintiffs by registered mail on May 4, 1950. The Secretary advised the Comptroller General on April 26, 1950, that plaintiffs' violations of the Act were of such a nature as to render them ineligible for Government contracts and stated that the application of the provisions of

section 3 of the Act (41 U.S.C. 37) as to them should not be waived. Plaintiffs were duly advised of the reference of the matter to the Comptroller General.

4. On May 16, 1950, the Comptroller General sent a written communication to all agencies of the United States, including the Department of the Army, as he was required to do by section 3 of the Act, instructing them that Harry Paisner and Samuel Paisner, copartners doing business as Westchester Hats, Bronx, New York, or any firm, corporation, partnership, or association in which such individuals or firm have a controllin interest, should not be awarded contracts for a period of three years beginning April 24, 1950.

By Change No. 9, dated May 26, 1950, to Basic List 1950 (dated January 15, 1950, entitled "Consolidated Confidential Listing of Firms and Individuals Ineligible, Disqualified, Debarred, Suspended or Otherwise Prohibited from Entering into Contractual Relationship With the Department of the Army," the Department of the Army made the following addition to said list:

Contractor, firm or individual	Additions effective date of suspension	Suspending agency, basis, ineligibility or prohibition
Paisner, Harry Samuel, Bronx, New York.	24 Apr. 50	Comp. Gen.; Walsh-Healey Act viol; No contracts to be awarded in period 3 yrs. from effective date. Sec. XII, ASPR.)
Westchester Hats	24 Apr. 50	See Harry and Samuel Paisner. (Sec. XII, ASPR.)

The name "Quality Manufacturing Company" did not appear on the foregoing list.

5. Pursuant to an invitation for bids issued by defendant on October 16, 1951, and a bid submitted by plaintiffs in response thereto, plaintiffs were awarded a contract by the New York Army Quartermaster Procurement Agency on December 14, 1951, for the manufacture of 50,000 sleeping bags from Government-furnished material at a price of $0.989 per unit for a total contract price of $49,450. The contract required delivery of 4,200 units in March 1952, 20,000 in April, 20,000 in May, and 5,800 in June. The invitation expressly made bids submitted pursuant thereto "subject to the terms and conditions of this invitation for bids and the attached schedule and general provisions", and the award specified that the contract consisted of the invitation, bid, schedule, general provisions, and the award. Paragraph 17 of the General Provisions incorporated by reference "all representations and stipulations required by said Act [i. e., the Walsh-Healey Public Contracts Act] and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect." The following clauses contained in regulations promulgated by the Secretary of Labor (41 C. F. R. 201.1), consisting of representations by the contractor, were not present in the contract documents *in haec verba* but were incorporated by reference in the contract:

> (h) The contractor is not a person who is ineligible to be awarded Government contracts by virtue of sanctions imposed pursuant to the provisions of section 3 of the [Walsh-Healey] act.
>
> (i) No part of the contract shall be performed and none of the materials, articles, supplies or equipment manufactured or furnished under the contract shall be manufactured or furnished by any person found by the Secretary of Labor to be ineli-

gible to be awarded Government contracts pursuant to section 3 of the [Walsh-Healey] act.

It is reasonable to conclude that the erroneous determination by the contracting officer that plaintiffs were not on the debarred list, which led to the award of the contract, was made in reliance on the list of debarred contractors rather than upon plaintiffs' subscription to the contents of the Secretary of Labor's regulations quoted above, which were incorporated into the contract by reference.

6. Plaintiffs commenced manufacturing operations after receipt of the award. On March 18, 1952, while plaintiffs were engaged in performance of the contract, they received from the contracting officer a telegram directing them to discontinue cutting and manufacturing operations pending further instructions. By this time plaintiffs had cut material for 11,000 units, but had completed none for shipment. By letter dated April 10, 1952, the contracting officer canceled the contract as void *ab initio* because it had been determined that the plaintiffs were currently barred from being awarded Government contracts under the provisions of section 3 of the Walsh-Healey Public Contracts Act, and directed plaintiffs to return all Government-furnished property in their possession. Plaintiffs subsequently returned this material to defendant.

7. Upon ascertaining the cause for the stop order of March 18, 1952, plaintiffs discussed the matter with the Government inspector assigned to the contract and were instructed by him to discontinue further cutting of material but to complete the manufacture and delivery of the

garments already cut.[1] At some time subsequent to the stop order of March 18 plaintiffs cut cloth for an additional 1,106 units, completed the manufacturing operations on a total of 12,106 units and, at various times between April 22 and May 16, 1952, shipped all of the completed units to defendant.[2] Each shipment was accompanied by a Materiel Inspection and Receiving Report on which appeared, under the signature of the Government inspector, the following certification:

> I certify that the items listed herein have been inspected by me or under my supervision. They conform to contract, and have been accepted, except as noted on the reverse side hereof.

The defendant accepted and retained all deliveries of completed units but has refused to pay for them. The contract price for plaintiffs' services in manufacturing and delivering the 12,106 completed units, and the reasonable value for such services, was $11,972.83. Plaintiffs' profit margin per unit was $0.119, and the prospective profit on the 37,894

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[1] Sharp conflict exists here. The inspector denied that he knew of the termination of the contract until May 16, 1952, the date of his last regular inspection report, when, for the first time, he noted on his report that plaintiffs' contract had been terminated. Plaintiff Paisner testified that he had discussed the termination with the inspector on several occasions during the latter's inspection visits, and that the inspector had instructed him to cut no more cloth but to complete the units for which cloth had already been cut. It seems inconceivable that plaintiffs would not necessarily have discussed with the inspector the matter of contract termination which would have had a pronounced effect on the inspector's duties. Having concluded that the inspector knew of the termination, it logically follows that he instructed plaintiffs to proceed as above, since the inspector signed his acceptance on the shipping documents accompanying subsequent shipments of completed units, thus confirming plaintiffs' contention that the inspector had given the disputed orders.

[2] 3,106 completed and accepted units, reasonably valued at $3,071.83, were shipped to defendant on May 16, 1952.

units terminated by defendant was $4,509.39. Plaintiffs' claim here is for $16,482.22 ($11,972.83 for completed and delivered units plus $4,509.39[3] loss of profits on units terminated). The canceled contract was relet to another contractor.

8. On December 13, 1951, prior to the award of the contract referred to in finding 5, New York Quartermaster Procurement Agency Standard Form 351, "Request for Approval of Award", was executed by defendant's purchasing agent and contracting officer. Under item 32 it stated that the debarred and suspended list had been reviewed and no bidders were listed thereon. Plaintiffs' bid had been in the name of Quality Manufacturing Company, indicated to be a partnership, and the signature and title of the person authorized to sign the bid was given as "Harry Paisner, partner." While Quality Manufacturing Company did not appear on the list of debarred and suspended contractors, the name of Harry and Samuel Paisner did (finding 4).

9. The method of advertising used by defendant for the contract in issue was the sending of circular letters to 108 dealers and posting of notices in public places. Plaintiffs were not on the list of dealers to whom the circular letters were mailed, but apparently secured the invitation from the office of the New York Army Quartermaster where a public notice of the invitation was posted.

10. On February 5, 1952, during the period of contract performance, plaintiffs petioned the Secretary of Labor to be removed from the list of debarred bidders (findings 2, 3, and 4). In that petition plaintiffs stated that they

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[3] Through mathematical error plaintiffs' claim for this item as given in the petition is $4,509.41.

were "scrupulously and with strict attention to the minutest detail" observing the labor standards prescribed by the Walsh-Healey Act and all Federal, State and municipal laws. On May 8, 1952, the Secretary of Labor requested the Comptroller General to remove plaintiffs' names from the list of debarred contractors so that they could be reinstated as eligible for Government contracts.

COUNTERCLAIMS

11. Defendant counterclaims for $182,666 on the following facts:

a. The cost to defendant of delivering to and removing from plaintiffs' plant that portion of the Government-furnished material which had not been used by plaintiffs in the production of 12,106 completed and delivered units was approximately $896.[4]

b. In addition to the contract sued for by plaintiffs, they were awarded two other contracts by defendant for the manufacture of field caps from Government-furnished material in November 1950 and June 1951, while they were on the list of debarred bidders. Plaintiffs produced and delivered the caps to defendant and were paid a total consideration of $181,580.46, of which plaintiffs' profit was $21,789.66. There is no evidence in the record as to the circumstances under which these contracts were awarded to plaintiffs while they were on the debarred list, but it is reasonable to conclude that they were comparable to those

[4] The cost of removing the material from plaintiffs' plant to the defendant's depot in Philadelphia was $302.69. The defendant had previously paid $782.85 to move the original material from an Army depot in Georgia to plaintiffs' plant. That portion of this latter cost allocable to the material not used by plaintiffs in the production of 12,106 completed and delivered units was $593.31, allocated on a ratio of complete units to terminated units.

described in the foregoing findings as to the contract sued upon. Nor is there any evidence that defendant made a demand upon plaintiffs for return of this sum at any time prior to the demand made in the counterclaim filed in this action on March 8, 1954.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are entitled to recover ten thousand, five hundred thirty-two dollars and twenty-one cents ($10,532.21) on their petition, and that defendant is entitled to recover of plaintiffs the sum of eight hundred ninety-six dollars ($896) on the first count of its counterclaim and the sum of twenty-one thousand, seven hundred eighty-nine dollars and sixty-six cents ($21,789.66) on the second count of its counterclaim, making a net recovery for defendant in the sum of twelve thousand, one hundred fifty-three dollars and forty-five cents ($12,153.45), and it is therefore adjudged and ordered that defendant recover of and from plaintiffs the sum of twelve thousand, one hundred fifty-three dollars and forty-five cents ($12,153.45).